UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

New Orleans, Louisiana

TESCO RAYTHEON TEAM (TRT) JOINT UNDERGRADUATE NAVIGATOR TRAINING (JUNT) T-1A
Employer

and **Case No. 15-RC-8300**

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter, the "Act," a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. Employers TESCO and Raytheon are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. There is no history of collective bargaining between the parties.

4. The Petitioner seeks to represent a unit of "all (JUNT) T-1A instructor pilots and operations clerk employed by the [E]mployers at their Sherman Field Naval Air Station facility" in Pensacola, Florida; excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act. Raytheon contends that the Chief of Flight and Ground Safety (CFGS) is a managerial employee and therefore should be excluded from the unit.

[1] TESCO and Raytheon both stipulated that they are engaged in commerce within the meaning of the Act.

Raytheon also contends that the Flight Operations Clerk is a confidential employee and an office clerical, and does not share a community of interest with the petitioned-for pilots and should thus be excluded from the unit. TESCO contends that the Chief of Flight Operations (CFO) and the Chief of Standardization and Evaluation (CSE) are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit. There are six employees in the petitioned-for unit (including the CFGS, CFO, CSE, and flight operations clerk). There is no history of collective bargaining for any of the employees involved herein.

TESCO provides civilian contract pilots under contract to the United States Air Force at Naval Air Station, Pensacola, Florida, in support of the Joint Undergraduate Navigator Training (JUNT) T-1A program, hereinafter referred to as the T-1A program. Employer Raytheon Aerospace Company provides employees and services for the T-1A program pursuant to a subcontract with TESCO. TESCO has six employees in the T-1A project: the Alternate General Manager, John Shay; the CFO, Joe Baudendistel; the CSE, Bob Ruth; pilot, Kevin Osburn; pilot, Tom Deluca; and another pilot position that is currently unfilled. Raytheon has three employees on the project: Program General Manager, Dan Brown; CFGS, Denny Earl; and Flight Operations Clerk, Sue Rider.[2] These employees together constitute what is referred to as the TESCO-Raytheon Team (TRT).

The proposed unit consists of five pilots and a Flight Operations Clerk. One pilot and the Flight Operations Clerk are Raytheon employees. The other four pilots are TESCO employees. There is an additional TESCO pilot position that is not currently filled. The five pilots are all included in the flight operations schedule and are assigned to act as duty officer on a rotating basis. The flight schedule and duty officer schedule includes the General Manager and Assistant General Manager who are also pilots. The mission of TRT is to engage in flight operations in support of military navigator training. The TRT pilots fly aircraft in which military student navigators, under the tutelage of military instructors, are engaged in navigation instruction. The contract pilots, essentially,

fly the aircraft as directed by student and instructor navigators. The daily flight operations schedule starts with some of the pilots arriving at about 6:30 a.m. There are three flight periods throughout the day: early, mid-day, and late. Normally pilots fly one or two periods of the day. Some fly the early schedule; some the late schedule. The day typically ends for the pilots on the late schedule between 5:30 and 6:00 p.m. Occasionally pilots are tasked to work weekends to accommodate the training schedule. The duty officer monitors a radio that provides communications with the aircraft operated by TRT pilots and acts as a back-up pilot in the event that a pilot who is scheduled to fly is not available. The Flight Operations Clerk, the only non-pilot in the requested unit, works primarily in the operations area of TRT at the desk of the Chief of Flight Operations. The pilots are salaried employees and the Flight Operations Clerk is an hourly employee. The normal working hours for the Flight Operations Clerk are 7:30 a.m. to 4:00 p.m. Monday through Friday. Unlike the pilots, the Flight Operations Clerk is not required to work weekends.

A. The Unit Description

In its post-hearing brief, TESCO asserts that the petitioned-for unit included only "instructor pilots" and thus excludes any non-instructor pilots, i.e., pilot Tom Deluca. In this regard, TESCO states that the parties never stipulated that the unit could be expanded to include non-instructor pilots. However, the hearing officer restated the unit sought by the petitioner toward the close of the hearing: "The included positions sought are the chief of flight operations, chief of standardization and evaluation, chief of flight and ground safety, line pilot Kevin Osburn, line pilot Thomas Deluca, the unfilled pilot position, and Sue Rider, the flight operations clerk." Thus, it is clear from the record that the understanding of the parties was that the unit description would include all of the pilots not stipulated to be supervisors. In fact, TESCO conceded on the record "that of the four people requested for the bargaining unit, that only two of them are, in fact, an appropriate unit, the CSE and the CFO to remain as supervisory personnel." As there are only two other TESCO employees (aside

[2] The parties stipulated and the record reflects that the Program General Manager, Dan Brown, a Raytheon employee, and the Assistant General Manager, John Shay, a TESCO employee, are supervisors within the

from the Assistant General manager who the parties have stipulated to be a supervisor) the two referred to have to be the remaining line pilots, Kevin Osburn and Tom Deluca. Accordingly, the Employers have been notified of the desired unit and have had a full opportunity at hearing to present any evidence or arguments regarding the unit sought. Additionally, TESCO did not object to the hearing officer's description of the unit at the hearing, and I consider any objection raised now to be untimely.

B. Joint Employer

The Petitioner asserts that TESCO and Raytheon are joint employers at the T-1A project. Raytheon, in its post-trial brief, and joined by TESCO, asserts that no joint employer relationship exists between the two employers.

In order to establish a joint employer relationship it must be established that the entities share or codetermine matters governing essential terms and conditions of employment. *M.B. Sturgis, Inc*., 331 NLRB slip op. at 4 (August 25, 2000), *citing NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. *Laerco Transportation* 269 NLRB at 325, citing *Boire v. Greyhound Corp*., 376 U.S. 473 (1964); *NLRB v. Browning Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), *enfg*. 259 NLRB 148 (1981). Thus, the Board finds separate entities to be joint employers when "one entity shares or codetermines those matters governing the terms and conditions of employment of the other entity's employees, such as hiring, firing, discipline, supervision, and direction." *G. Wes Limited Company,* 309 NLRB 225 (1992), citing *Laerco Transportation & Warehouse,* 269 NLRB 324, 325 (1984). As the Board noted in *Sun-Maid Growers,* 239 NLRB 346, 351 (1978), the Board need only conclude that an employer exercises effective control over the working conditions of the employees to find that the employer is a

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meaning of the Act.

joint employer. The Board determines the issue of joint employer upon the totality of the facts of each case. *Cabot Corporation,* 223 NLRB 1388 (1976).

Here the evidence establishes that, although personnel records and pay accounting are maintained separately, in all other aspects of the day-to-day operations of TRT, TESCO and Raytheon act as one. TRT holds itself out to the public as a single entity. In this regard, the General Manager testified that TRT actively seeks to "show the customer a common face…to ensure that the customer [feels] they were dealing with one group of people." To that end, TESCO and Raytheon employees work side-by-side, performing the same work and are subject to the same supervision. TESCO and Raytheon pilots fly together based on a "TRT Flight Schedule" and according to a "TRT Flight Manual" and are interchangeable in fulfilling the contractual flying obligations. TESCO and Raytheon pilots wear the same flight suit with "TRT" markings. The "TRT" flight schedule is compiled by the Flight Operations Clerk, a Raytheon employee, as instructed by the Chief of Flight Operations, a TESCO employee, and approved by the Program General Manager, a Raytheon employee, or, in his absence, by the assistant general manager, a TESCO employee. A TESCO employee, pilot Bob Ruth, was hired by TESCO based upon a recommendation by the General Manager of the T-1A project, Dan Brown, a Raytheon employee. In the one instance of disciplinary action against an employee that has occurred on the T-1A program, the termination of a TESCO employee, the evidence is clear that the General Manager Dan Brown, a Raytheon employee, recommended that action to Program Manager Mike Vogt, a TESCO employee. The General Manager, a Raytheon employee, has overall responsibility for flight operations in conjunction with the T-1A project. Although Raytheon asserts that the General Manager's supervisor is Ron Hudson of Raytheon, the subcontract between TESCO and Raytheon provides that the Raytheon General Manager is required to "[r]eport to the TESCO Program Manager (Mike Vogt) in performance of his duties." The evidence also shows that, in the absence of the General Manager, the Flight Operations Clerk, a Raytheon employee, operates under the supervision and direction of the Assistant General Manager, a TESCO employee.

In the Section 8(b)(4)(B) context, the Board has held that an employer that controls the identity of its subcontractor's employees is a joint employer, even if it has no other involvement with the employee's terms and conditions of employment. See *Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Roslyn Americana Corp.)*, 214 NLRB 868 (1974) (general contractor was joint employer with its subcontractor where their contract required the subcontractor to employ only those persons "agreeable to" the general contractor). Where one employer inserts itself into such a "basic area" of the other employer's labor relations, nothing further need be shown to demonstrate joint employer status. *J.E. Hoetger and Company*, 221 NLRB 1337, 1339 (1976) (general contractor was joint employer with its subcontractor where their contract provided that the subcontractor would only employ members of a particular union). Here the record evidence, and, in particular, the "Work Authorization" executed by TESCO, shows that TESCO designated by name the two principal Raytheon employees to work on the T-1A project, General Manager Dan Brown and Chief of Flight and Ground Safety Denny Earl.

The Board has long recognized that the commercial reality of the business relationship is an important consideration. *Jewell Smokeless Coal*, 170 NLRB 392, 393 (1968). In *Hoskins Ready-Mix Concrete*, 161 NLRB 1492, 1493 (1966), the Board relied on the fact that the user was contractually obligated to reimburse the supplier for payroll expenses, and therefore the supplier "would be the ultimate source of any wage increase for [the supplier's] employees that might be negotiated with a union." In *Floyd Epperson*, 202 NLRB 23 (1973), the Board found joint employer status based not only on the user's control over supplied driver's schedules and assignments, but also on "some indirect control over their wages." In that case the General Counsel had argued that the supplier's business, and wage increases for the supplier's drivers, completely depended on the user increasing the supplier's contractual remuneration, and that the "close connection" of the drivers with the user's enterprise necessarily establishes control over their work week "as a matter of economic reality." 202 NLRB at 26. Here, TESCO is contractually obligated to reimburse Raytheon for "monthly services", which includes the wages of the three Raytheon employees, and "reimbursable travel" expenses.

Raytheon and TESCO assert that their consent is required before a unit containing employees of both employers can be determined to be appropriate. That is not an accurate statement of current Board law. In accordance with the Board's decision in *M. B. Sturgis, Inc.*, *supra*, a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers. 331 NLRB slip op. at 12.

The record shows that TESCO and Raytheon share or codetermine matters governing essential terms and conditions of employment. I find, therefore, that TESCO and Raytheon are joint employers of the employees in the unit sought by the Petitioner.

C. Supervisory Status

Section 2(3) of the Act, 29 U.S.C. § 152(3), defines "employee" broadly, with certain exclusions. Supervisors are one of the exclusions. *Id*. Section 2(11) of the Act, 29 U.S.C. § 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The enumerated powers in Section 2(11) are to be read in the disjunctive. *Amperage Electric*, 301 NLRB 5 (1991). In other words, possession of any one of the indicia of supervisory authority specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee. *Allen Services Co*., 314 NLRB 1060, 1061 (1994); *Auto West Toyota*, 284 NLRB 659 (1987). However, possession of one or more of the stated powers does not convert an employee into a 2(11) supervisor if the exercise of such authority does not require the use of independent judgment. Section 2(11); *Electrical Workers IBEW Local 428 (Kern County Chapter NECA)*, 277 NLRB 397, 408 (1985); *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981). If the supervisory indicia are exercised in a merely routine, clerical, perfunctory, or sporadic manner, then supervisory status is not conferred on

an employee. *Allen Services Co., supra; Browne of Houston, Inc*., 280 NLRB 1222, 1223 (1986); *Feralloy West Co*., 277 NLRB 1083, 1084 (1985). Employees who are merely conduits for relaying management information to other employees are not supervisors. *Browne of Houston, Inc., supra*.

The powers enumerated in Section 2(11) are termed the "primary" indicia. When the issue of supervisory status presents a borderline question, "secondary" indicia may be considered. *Monotech, supra; NLRB v. Chicago Metallic*, 794 F.2d 527 (9th Cir. 1986). However, secondary indicia alone will not confer supervisory status under the Act. *John N. Hansen Co*., 293 NLRB 63, 64 (1989); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1080 (1985). In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize – a right Congress intended to protect by the Act. *Phelps Community Medical Center*, 295 NLRB 486 (1989). *Bay Area-Los Angeles Express, supra* at 1073; *Chicago Metallic*, 273 NLRB 1677, 1689 (1985); *and Hydro Conduit Corp*., 254 NLRB 433, 437 (1981), *citing and quoting from McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981), *and Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

If a person actually possesses the statutory authority, he does not lose it by exercising it infrequently or even not at all. *Babcock & Wilcox Construction Co*., 288 NLRB 620, 621 fn. 3 (1988); *Groves Truck & Trailer*, 281 NLRB 1194 fn. 1 (1986); *Opelika Foundry*, 281 NLRB 897, 899 (1986). On the other hand, "paper credentials" must be accompanied by actual authority. *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967). Mere title and theoretical power are insufficient. *NLRB v. Southern Bleachery*, 257 F.2d 235, 239 (4th Cir. 1958), *enfg*. 118 NLRB 299 (1957). The status of an individual as a statutory supervisor, or not, is determined by his or her actual duties, not by the job title or classification. *Waterbed World*, 286 NLRB 425, 426 (1987); *Metallic Corp*., 273 NLRB 1677, 1688-1689 (1985), *enfd. on point* 794 F.2d 527 (9th Cir. 1986).

1. Chief of Standardization and Evaluation

TESCO asserts that the Chief of Standardization and Evaluation (CSE), Robert Ruth, is a supervisor within the meaning of the Act. The evidence shows that Ruth is a pilot performing the

same duties as line pilots and assigned the additional or collateral duties of the CSE. He spends ninety to ninety-five percent of his time on either being a pilot or on duties associated with being a pilot. The additional duties of the CSE entail ensuring compliance with U.S. Navy, U.S. Air Force, and internal TRT regulations and procedures. This primarily involves maintaining the training, standards, and evaluation records required by regulation. The CSE is not authorized to make changes to U.S. Air Force standards or regulations. He could make recommendations to change a TRT standard operating procedure but never has. The CSE represents TRT at Training Wing Six standardization meetings and provides feedback to TRT. The CSE does not have a written procedure by which he on a regular basis evaluates the TRT pilots. In fact the CSE's authority to evaluate pilots is purely speculative, as the Government Flight Representative has not certified the CSE as a contractor flight evaluator, a necessary prerequisite to such evaluations. The record contains no evidence that the CSE has authority to hire, lay off, recall, promote or discharge employees, adjust their grievances, approve vacation requests, or grant time off. The CSE does not wear a uniform indicating his position as a supervisor. He does not have a separate office. The CSE does receive an annual pay differential of $3,500.00 above that paid to line pilots.

2. Chief of Flight Operations

TESCO asserts that its Chief of Flight Operations (CFO), Joe Baudendistel, is a supervisor within the meaning of the Act. The evidence shows that he is primarily a pilot performing the same duties as line pilots with the additional duties of CFO. He spends ninety-five percent of his time piloting a plane or with duties associated with piloting a plane. The CFO duties involve development, production, presentation and execution of the flight schedule. This primarily involves "deconflicting" the flight schedule, i.e., avoiding conflicts with pilots' requests for personal time, leave, etc., and compliance with FAA, USAF, and base regulations regarding matters such as "crew days" (the number of hours of uninterrupted rest required before a pilot can fly again). According to the evidence in the record, the flight schedule is, ultimately, the responsibility of TRT General Manager Dan Brown while compilation of the schedule is an additional duty assigned to the CFO. In practice,

however, the evidence shows that the flight schedule is compiled by the Flight Operations Clerk, Sue Rider, based on a matrix or formula developed by the CFO. Since the actual flight requirements are established by the military training squadrons, the only action required in developing the flight schedule for the TRT pilots is to match pilots to the flight missions ensuring that the flight hours are equitably distributed and that FAA and USAF regulations are complied with. This involves little independent judgement or discretion. No evidence was presented to establish that the CFO has any authority to hire, lay off, recall, promote or discharge employees, adjust their grievances, approve vacation requests, or grant time off. He does not wear a uniform indicating his position as a supervisor and does not have a separate office. The CFO does receive an annual pay differential of $3,500.00 above that paid to line pilots.

In its post-hearing brief TESCO cites, in support of the proposition that the CSE and CFO are statutory supervisors, cases involving pilots whom the Board found to be supervisors. However, in each case cited by TESCO the pilot-supervisors displayed indicia of supervisory status not found in the CSE or CFO duties. In *Lockheed-California, Co*., 207 NLRB 686, 687 (1973), the Board found that the "pilot in charge" of a training flight was a supervisor as to his flight crew. The Board's decision hinged on the authority and responsibility that the pilot in charge exercised over the crewmen and other personnel aboard the aircraft that was not merely routine or clerical in nature but involved independent judgement and great responsibility. *Id*. at 687. In *Petroleum Helicopters, Inc*., 184 NLRB 60, 61 (1970), the Board found that "lead pilots" who were in charge of the employer's many bases, made reports leading to recommendations and personnel actions, assigned pilots, and attended supervisors' meetings, were supervisors and excluded them from the unit. In *Beckett Aviation Corp*., 254 NLRB 88, 89 (1981), the "division chief pilot" who, in addition to scheduling the working hours of each pilot, had authority to resolve grievances, impose discipline, and recommend hiring and termination of pilots was found to be a Section 2(11) supervisor.

There is no evidence in the record indicating that the CFO or CSE have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or responsibly direct,

to adjust grievances, or effectively to recommend such action. Any authority the CFO and CSE may have with respect to scheduling, transferring, assigning work or disciplining and rewarding employees appears to be based on regulation, is clerical in nature and is *de minimus*. The duties of the CFO and CSE are administrative and routine. Their actions are directed at compliance with regulation, and not supervision of employees. The Board has repeatedly held that individuals possessing the duties and responsibilities similar in nature and scope to those possessed by the CFO and CSE at issue herein do not exercise independent judgment in the manner contemplated by Section 2(11) of the Act. Rather, the decision-making authority shown on this record is, at best, the kind of routine decision-making authority typical of nonsupervisory leadmen rather than true supervisory authority within the meaning of Section 2(11) of the Act. *See, e.g., North Shore Weeklies, Inc*., 317 NLRB 1128 (1995); *Quadrex Environmental Co*., 308 NLRB 101 (1992); *and Vanport Sand & Gravel, Inc*., 267 NLRB 150 (1983).

Finally, the burden of providing evidence of supervisory status rests on the party asserting that such status exists. *S. S. Joachim & Anne Residence*, 314 NLRB 1191, 1194 (1994); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); *Browne of Houston, Inc., supra.; Tucson Gas & Electric Co*., 241 NLRB 181 (1979). Applying these principles to the instant case, I find that the Employers have failed to demonstrate that the CFO and CSE are supervisors as defined in Section 2(11) of the Act.

D. The Chief of Flight and Ground Safety

Raytheon contends that the Chief of Flight and Ground Safety (CFGS), Denny Earl, is a managerial employee and thus should be excluded from its petitioned-for unit. The CFGS is responsible for ensuring that all the safety requirements specified in Air Force and Navy guidance is complied with. He is responsible for modifying and ensuring that the TRT safety handbook is correct and up to date. The CFGS is responsible for safety reviews. The CFGS attends safety meetings at Training Wing Six (the Navy training command at NAS Pensacola) and other locations on behalf of the TRT General Manager. He attends the air traffic control board meetings. He is responsible for

ensuring that the pilots on an operational level are physically prepared to fly. He does not have a separate office. The TRT General Manager testified that ninety to ninety-five percent of the CFGS' time is spent being a pilot. The balance of the time is spent attending safety meetings.

Managerial employees are defined as those employees who "formulate and effectuate management policies by expressing and making operative decisions of their employer." *NLRB v. Yeshiva University*, 100 U.S. 672, 682-683 (1980). Managerial employees must be aligned with management and must exercise discretion within, or independently of, established employer policy. *Id.* at 682-683. The record shows that the CFGS is principally a pilot whose collateral duties as CFGS require him to perform such tasks as "[ensuring] contractor participation in hazardous air traffic report program, IAW AFI," i.e., complying with U.S. Air Force and FAA regulations. The record is devoid of any discretion being exercised by the CFGS or any other evidence of the making of operative decisions other than those required by regulation on a routine basis.

It is well established that employees will be excluded from the unit as managerial employees only if they formulate and effectuate management policies by expressing and making operative decisions of their employer or have discretion in the performance of their jobs independent of the employer's established policy. *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974); *Reading Eagle Co*., 306 NLRB 871 (1992); *Ohio River Co*., 303 NLRB 696, 714 (1991). The Petitioner, however, has failed to establish that the CFGS formulates any policies on behalf of the Employer or has any discretion in the performance of his job independent of the Employer's established policy and regulation. Accordingly, I find that the CFGS does not meet the definition of a "managerial employee" under the Act and I shall include him in the unit.

E. Flight Operations Clerk

Raytheon asserts that the Flight Operations Clerk is a confidential employee, an office clerical, and that she lacks sufficient community of interest with the pilots and, consequently, should be excluded from the unit.

The Flight Operations Clerk, Sue Rider, picks up the mail, collects information from flights and enters it into a computer, generates reports from the computer, builds the flight schedule, handles the Raytheon budget, is responsible for the petty cash for TESCO and Raytheon, obtains schedules from the military training squadrons, maintains a logbook of pilot availability, assigns TRT pilots to the schedule based on the flight requirements and pilot availability, enters the information into the computer and brings the flight schedule to the General Manager for signature. The evidence shows that Rider spends the majority of her time working in the operations area. She answers the radio when the duty officer is not available. She interacts with the pilots in setting the flight schedule. She trains pilots on forms and documentation. The Flight Operations Clerk answers the telephone and is the TRT point of contact with the military for daily scheduling. She handles internal and external reporting, compiles, maintains, audits, and submits the monthly fuel report, and maintains the suspense log for mission-critical meetings and obligations. Rider is not a pilot.

1. Confidential Employee

Board law makes clear that mere access to confidential labor relations material such as personnel files, minutes of management meetings, strike contingency plans, departmental strategic planning and grievance responses is not sufficient to confer confidential status unless it can be shown that the employee at issue played some role in creating the document or in making the substantive decision being recorded or has regular access to labor relations information before the union or employees involved. *Inland Steel Company*, 308 NLRB 868 (1992), *citing Associated Day Care Services of Metropolitan Boston*, 269 NLRB 178, 181 (1984); *Greyhound Lines*, 257 NLRB 477, 480 (1981); *California Inspection Rating Bureau*, 215 NLRB 780, 783 (1974); *Los Angeles New Hospital*, 244 NLRB 960, 961 (1979); *ITT Grinnell Corp*., 212 NLRB 734 (1977). The Board has long held that mere access to and compilation of information, without more, does not convert a rank and file employee to confidential status. *Inland Steel Company*, 308 NLRB at 873, *citing Washington Post Co*., 254 NLRB 168, 197 (1981); *Greyhound Lines*, 257 NLRB 477, 480 (1981). The Board applies a narrow test in making determinations as to whether an employee is "confidential" and should,

therefore, be excluded from the unit. In *NLRB v. Hendricks County Rural Electric Membership Corp*., 454 U.S. 170 (1981) the Supreme Court affirmed the Board's "labor nexus" test under which only those employees who act in a confidential capacity to persons exercising managerial functions in labor relations matters are deemed to be confidential employees. *Hendricks*, 454 U.S. at 188-89.

The party asserting confidential status has the burden of providing evidence to support its assertion. *Crest Mark Packing Co.,* 283 NLRB 999 (1987). Here, the Employer has failed to meet its burden, inasmuch as it offered no evidence that the Flight Operations Clerk acts in a confidential capacity to any person who formulates, determines, and effectuates management policy in labor relations. The mere fact that the Flight Operations Clerk may have access to "confidential" information does not establish confidential status. *Bakersfield Californian*, 316 NLRB 1211 (1995). The evidence shows that the personnel records are not maintained at the TRT site. She therefore does not have access to the personnel files of any of the employees. Further, the record shows that Rider's supervisor, the TRT General Manager, does not exercise managerial functions in labor relations matters. I conclude, therefore, that the Flight Operations Clerk has not been shown to be a confidential employee.

2. Office vs. Plant Clerical

The Board has long held that the distinction between plant clerical and office clerical employees is rooted in community of interest concepts. *Minneapolis-Moline Co*., 85 NLRB 597, 598 (1949). To that end, the duties and functions of plant clericals relate to the production or service process while the duties and functions of office clericals relate to general office operations. *Syracuse University*, 325 NLRB 162 (1997). "Plant clerical employees are typically included in a production and maintenance unit because they generally share a community of interest with the employees in the unit." Id., *citing Raytee Co*., 228 NLRB 646 (1977), and *Armour and Co*., 119 NLRB 623 (1957). The test is usually whether the employees' duties are related to the production or service process (plant clericals) or related to general office operations (office clericals). *Syracuse* 325 NLRB at 168. The distinction is rooted in community-of-interest concepts. *Syracuse* at 168 citing *Mitchellace Inc*., 314 NLRB 536 (1994); *Cook Composites & Polymers Co.,* 313 NLRB 1105 (1994). The community of interest test examines a variety of factors to determine whether a mutuality of interests in wages,

hours, and working conditions exists among the employees involved. *M.B. Sturgis, Inc.* 331 NLRB *slip op*. at 8, *citing Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962); Swift and Co., 129 NLRB 1391 (1961); *Continental Baking Co*., 99 NLRB 777, 782-783 (1952); 15 NLRB Ann. Rep. 39 (1950). As the Board recently reiterated: "Under Section 9(b) of our statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit." *Sturgis* at 9 citing *Swift & Co*., 129 NLRB 1391 (1961); *Kalamazoo Paper Box*, 136 NLRB 134 (1962). The Board has found relevant factors to include engaging in activities closely associated with the duties performed by other unit members, *Syracuse University* at 168; common supervision, *ABS Co*., 299 NLRB 516 (1990); and regular and substantial work contacts with other unit employees *Syracuse University* at 168; *John Hansen Co*., 293 NLRB 63 (1989). That some of the employees working for that employer may have some differing terms and conditions of employment from those of their colleagues does not ordinarily mean that those employees cannot be included in the same unit, although it might, in some circumstances, permit them to be represented in a separate unit. See, e.g., *Berea Publishing Co*., 140 NLRB 516, 518 (1963).

The Board has long relied on community of interest factors in determining whether separate groups of employees should be included in an appropriate unit for purposes of representation by a labor organization. *Swift & Co.*, 129 NLRB 1391 (1961); *See also*, *United States Steel Corp.*, 192 NLRB 58 (1971). Such factors include common supervision, nature of employee skills and functions, interchange of employees, work situs, general working conditions and fringe benefits. Also considered is the extent of the employer's organizational structure. *Kalamazoo Paper Box, Corp.*, 136 NLRB 134, 137 (1962); *International Paper Co.*, 96 NLRB 295, 298, fn. 7 (1951). None of these factors, individually, is determinative; all are weighed in deciding whether a sufficient community of interest exists so as to include separate, identifiable groups of employees in an appropriate unit. The Act, however, allows a union to petition for an appropriate unit, and does not require it seek the most appropriate unit, even when a different than petitioned-for unit might be more

appropriate. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd*. 190 F.2d 576 (7th Cir. 1951); *Omni-Dunfey Hotels, Inc.*, 283 NLRB 475 (1987); *Federal Electric Corp*, 157 NLRB 1130, 1132 (1966); *Capital Bakers*, 168 NLRB 904, 905 (1967).

In these circumstances, and particularly because of the functional integration of the Flight Operations Clerk job duties with the job duties of the other bargaining unit employees, their overlapping supervision, regular contact, and similarity of general working conditions, I conclude that the Flight Operations Clerk shares a sufficient community of interest with the balance of the proposed bargaining unit employees to warrant her inclusion in the unit. As a final consideration, I note that if the flight operations clerk were not included in this unit, she would be a single employee completely without representational rights, an assuredly undesirable result. *See Gateway Equipment Company*, 303 NLRB 340, 342 (1991).

The parties stipulated, and the record shows, that General Manager Dan Brown and Assistant General Manager John Shay have the authority to hire, discharge or discipline employees or to effectively recommend such action or to assign and direct the work of employees utilizing independent judgment, and that they are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All JUNT T-1A pilots, including the Chief of Flight and Ground Safety, the Chief Flight Officer, and Chief of Standardization and Evaluation, and Flight Operations Clerk employed by the Employers at their TRT operation at Sherman Field Naval Air Station facility in Pensacola, Florida; excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who

were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Association of Machinists and Aerospace Workers, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employers with the undersigned who shall make the list available to all parties to the election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In order to be timely filed, such list must be received in the New Orleans Regional Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana 70112-3723 on or before October 12, 2000.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C., by October 19, 2000.

SIGNED AND DATED at New Orleans, Louisiana on this 5th day of October, 2000.

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Curtis A. Wells
Regional Director
National Labor Relations Board
Region 15

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